UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

XENEX DISINFECTION SERVICES, LLC, *Plaintiff*,	§	
v.	§	CIVIL ACTION NO.: 5:14-cv-01134-OLG
SPECTRA254, LLC, *Defendant*.	§	

COUNTERCLAIM

Defendant Spectra254, LLC ("Spectra254"), as and for its Counterclaim against plaintiff Xenex Disinfection Services, LLC ("Xenex"), alleges as follows:

COUNT ONE—VIOLATION OF SECTION 43(a) OF THE LANHAM ACT

1. Spectra254 is a limited liability company organized and existing under the laws of the State of Connecticut.

2. Xenex is, upon information and belief, a limited liability company organized and existing under the laws of the State of Texas that maintains its principal place of business at 121 Interpark Boulevard, Suite 104, San Antonio, Texas 78216.

3. This Court has jurisdiction over this Counterclaim pursuant to 28 U.S.C. §§ 1331, 1338 and 1367(a) inasmuch as it arises under 15 U.S.C. § 1125(a) and is so related to the claim in the Complaint that it forms part of the same case or controversy.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1390(a) inasmuch as Xenex resides in this judicial district and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

5. Spectra254 is engaged in the business of, among other things, developing, marketing and selling high-power, easy-to-use, affordable UVC light decontamination systems that are designed to eliminate the deadly microorganisms that cause hospital associated infections ("HAIs"). In general terms, Spectra254 devices utilize High Output Low Pressure UVC lamps to emit a constant dose of UVC light to the target area being disinfected. The Spectra254 systems provide a "green" approach to the elimination of HAIs.

6. Xenex is also engaged in the business of developing, marketing and selling hospital disinfection equipment designed to eliminate HAIs.

7. Spectra254 and Xenex are direct competitors.

8. All of the products that Spectra254 markets and sells have been subjected to extensive safety and efficacy testing, meet all safety standards and have earned all applicable safety certifications. Spectra254 publishes the independent testing data regarding its products.

9. In or about June 2010, Xenex first began to market and sell a portable pulsed ultraviolet (UV) light system that it claimed was designed to sanitize entire rooms.

10. The initial product Xenex marketed and sold in the United States was manufactured in Russia. According to information Xenex published on its website:

> The Xenex disinfection device produces pulsed Xenon UV light that rapidly decontaminates rooms in minutes. The device completely inactivates all bacteria, viruses and spores without surface contact.

11. The Xenex device required independent testing for compliance with published safety guidelines.

12. UL safety standards derive from a global independent safety science company that sets standards which are recognized as benchmarks for the safety of products.

13. A product that meets UL Safety standards enjoys public confidence that it can be used without, for example, the risk that the electricity it employs will cause a fire.

14. A product that is tested and proven to meet applicable safety criteria is permitted to display a certification of such compliance. Such products receive what is known as an "Authorization to Mark."

15. Products that have not been tested and proven to comply cannot be legally sold in the United States.

16. The June 2010 Xenex product did not receive an authorization of compliance, *i.e.*, an Authorization to Mark.

17. The next model Xenex introduced of its portable disinfection system was the Xenex PX426i. Xenex first offered its model PX426i for sale on April 30, 2012.

18. The Xenex PX426i rotates the UV strobe light filter because the frame on the static device created shadows and areas which the light did not reach and therefore were not treated. Adding the rotational feature required the addition of a second elective motor and it changed the electrical design of the product. The Xenex model PX426i also added the feature of a light filter and a tower that surrounds the strobe light to blow air and cool the light while a top diffuses the heat.

19. Xenex claims that its model PX426i complies "with the requirements of the standard(s) for Electrical Equipment for Measurement, Control and Laboratory use, Part I General Requirements (UL-61010-1)." However, the Xenex product marketed and sold in the United States did not, according to its own literature and training video, work with a ground fault circuit interrupter ("GFCI"); Xenex instructs users to plug its machine into a non-GFCI power source. Without the capability of a GFCI, a product cannot meet the UL-61001-1 standard.

20. The need for the disinfection device to work with a GFCI is particularly acute given that the product is intended to be used in wet hospital environments. An electrical device that repeatedly trips a GFCI cannot pass the UL-61010-1 safety standard

21. As a matter of basic safety prudence, an electrical device that repeatedly trips a GFCI should be tested for leakage current. The tripping of a GFCI provides a clear indication that the Xenex device does not meet the UL specification that the peak leakage current be less than 5 milliamps.

22. The independent testing laboratory Xenex uses, Intertek Testing Services, N.A. ("Intertek"), has refused to provide any meaningful information about the Xenex product(s) that it has tested or the way in which any tests were conducted.

23. Despite the issues with the GFCI, Xenex has marketed and advertised and continues to market and advertise its disinfectant devices as safe.

24. The Xenex Model PX426i does not display or indicate FCC compliance or FCC warning labels.

25. Xenex has marketed and advertised its portable disinfection product by also making a variety of claims regarding its efficacy and regarding its competitors. Such express and implied claims have included the following:

- Disinfection efficacy several times faster than mercury UV.
- 9 times more effective against C. difficile in 5 minutes than mercury devices in the same time and space
- Faster, more effective, and easier to use than mercury-based UV systems.
- Mercury lamps are Low Intensity, Narrow Spectrum emitters that only produce weak damage to cells.

- Mercury vapor systems [have] about a 40% efficiency for DNA damage.
- Proven more effective than hand cleaning with bleach.
- Proven to eliminate >99.9% of Ebola virus in less than 5 minutes.
- Mercury bulbs contain elemental mercury, which means they are classified as hazardous and toxic.
- The Xenex UV system "is the only device that is 100% green and non-toxic."
- The Xenex systems is more effective than UV devices that use mercury bulbs in eliminating surface pathogens and micro-organisms in healthcare facilities.
- Broad spectrum UV light offers more germicidal efficacy at a faster spread than single spectrum devices.
- The Xenex UV System has proven to be more effective than - and a suitable alternative to -conventional bleach disinfection methods.
- UV disinfection devices that use mercury bulbs are toxic to humans and hazardous to the environment under normal use conditions.
- The Xenex System has been certified as 100% green, is non-toxic to humans and to the environment, and has significant environmental benefits.

26. Xenex used such marketing and advertising claims in interstate commerce to compete against Spectra254.

27. Xenex has used such marketing and advertising claims to solicit sales of its products to the United States government and, in particular to government hospital and military facilities. In some cases, the Xenex product was purchased by the government without a competitive bidding process because of the claims Xenex made. For example, on November 1, 2012, the Naval Medical Logistics Command issued a "limited source action" for the

procurement of two disinfection devices manufactured by Xenex on the grounds that, among other things, "[t]he Xenex robot, a green technology, provides hospital environment disinfection by deactivating bacteria, viruses, and spores including: C-diff, MRSA, and VRE. The Xenex device supports the reduction of healthcare associated infections through the use of pulsed-xenon Ultraviolet (UV), a broad-spectrum, high-intensity light 25,000X more intense and 9X faster than mercury." The November 1, 2012 certification further stated that "Xenex is the only certified GREEN UV technology available on the market."

28. The Xenex marketing and advertising claims relied upon by the government and other potential purchasers of disinfection devices were false. Such statements have either deceived or have the capacity to deceive a substantial segment of potential purchasers of disinfection devices and are likely to influence potential purchases. Spectra254 has been and is likely to be injured by the false statements Xenex has made.

29. In direct response to a challenge made to the National Advertising Division regarding the validity of the Xenex marketing and advertising claims, on March 5, 2015 Xenex announced that it will no longer make any of the advertising claims listed above.

30. Despite making the announcement regarding the discontinuation of the advertising claims listed above, Xenex continued to post such claims on its website after March 5, 2015. Xenex uses its website to promote, market and advertise its products and to urge potential consumers to buy its products rather than competitive products.

31. In addition to the claims set forth above, Xenex has marketed and advertised its portable disinfection devices on the basis of assertions it has made regarding its capabilities to eradicate the microorganisms that cause HAIs such as Clostridium difficile, Methicillin-resistant Staphylococcus aureus and the Ebola virus. The charts and tables Xenex uses to trumpet the

efficacy of its products fail to identify the distance of effectiveness of the product or the time necessary to effect the claimed eradication; as such, the charts are deceptive to potential purchasers.

32. Xenex has not published any independent test data sufficient to support its claims regarding the effectiveness of its products as devices to eradicate HAIs.

33. Xenex's acts, as described herein, constitute acts of false advertising in violation of Section 43(a) of the Lanham Act, I5 U.S.C. § 1125(a).

34. Spectra254 is within the zone of interests protected by Section 43(a) of the Lanham Act because the false advertising of Xenex has caused injuries to Spectra254's business reputation and to its present and future sales by causing potential purchasers to withhold trade from Spectra254.

COUNT TWO—UNFAIR COMPETITION

35. Spectra254 repeats and alleges each of its allegations contained in Paragraphs 1-34 of Count One of the Counterclaim as if fully set forth at length herein.

36. Xenex's actions, as set forth herein, constitute unfair competition in violation of Texas common law.

PRAYER

WHEREFORE, Spectra254 prays for the entry of a Judgment providing for:

a. Recall of all products sold on the basis of the Xenex false advertising.

b. Temporary and permanent injunctive relief enjoining Xenex from making false and unsupported claims regarding the efficacy of its portable disinfection devices or any competitive products and from selling any product that does not work with a GFCI.

c. Compensatory damages.

d. Punitive damages.

e. Attorneys' fees.

f. Costs.

g. Such other and further relief that the Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2015, a copy of the Defendant Specta254, LLC's Counterclaim was served on Plaintiff's attorney of record via facsimile and first-class U.S. Mail addressed to:

J. Bruce Scrafford
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William B. Steele III